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SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 230

BOSTON AND MAINE RAILROAD, ET AL., Appellants,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, LOUISVILLE AND NASHVILE RAILROAD COMPANY, ET AL., - - - - - Appellees.

MOTION OF APPELLEES LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
LOUISVILLE AND NASHVILLE RAILROAD
COMPANY, ET AL., - - - - *Appellees.*

MOTION OF APPELLEES LOUISVILLE AND NASHVILLE RAILROAD COMPANY AND ATLANTIC COAST LINE RAILROAD COMPANY TO AFFIRM

AND

BRIEF IN SUPPORT OF THE MOTION.

I.

THE MOTION.

Appellees, Louisville and Nashville Railroad Company (hereinafter called L. & N.) and Atlantic Coast Line Railroad Company (hereinafter called Coast Line), pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, respectfully move that the final judgment and decree of the District Court be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument.

II.

BRIEF IN SUPPORT OF THE MOTION.

Opening Statement.

This action involves an attack on the order of the Interstate Commerce Commission[1] which found divisions of the joint rates involved in this proceeding to be "unjust, unreasonable, and inequitable" (p. 58a),[2] in violation of Section 1(4) of the Interstate Commerce Act,[3] and fixed the just, reasonable and equitable divisions to be observed in the future based upon the considerations required of it by Section 15(6).[4] The Court below made the following finding of fact:

> "There was evidence, typical in character and sufficient in quantity, of the nature of the traffic and operating conditions, and of the joint rates and bases of divisions, of L&N and Coast Line on the one hand, and of the participating northern railroads as a group on the other, to enable the Commission to prescribe the 29885 basis of divisions without the necessity of requiring specific evidence and separate adjudication in respect to

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[1]Dated January 28, 1960, which, under stipulation of the parties approved by the Court below, became effective July 18, 1960, as to traffic delivered by the L. & N. and Coast Line. As to traffic delivered by the northern railroads the order is not, under the said stipulation, in effect, but the revenues of the L. & N. and Coast Line are protected by bonds fixed by the Court below. The Commission's decision is reported at 309 I.C.C. 491.

[2]Page numbers so shown, without other explanation, refer to page numbers of the Jurisdictional Statement or its Appendices.

[3]49 U.S.C. Sec. 1(4), 54 Stat. 900; reproduced herein as Appendix A.

[4]49 U.S.C. Sec. 15(6), 41 Stat. 486, reproduced in the Jurisdictional Statement, p. 3.

each division of the joint rates between each of the two southern railroads and each plaintiff." (p. 26a)

It also said ". . . we believe that the report contains sufficient findings of fact to enable the Court to perform the task assigned to it on review" (p. 13a) and that the findings of the Commission as set forth in the Court's opinion "are supported by substantial evidence" (p. 18a).

Again, and after a careful consideration of all of the questions raised by appellants, the Court concluded:

> "We are persuaded from a careful study of the record that the findings of fact made by the Commission are supported by substantial evidence and that they in turn supply a rational basis for the ultimate findings and for the order. We are further of the opinion that in arriving at its decision the Commission substantially observed the standards prescribed by the Interstate Commerce Act." (p. 28a)

The first major finding of the Commission (p. 32a) contains in it the essence of this whole proceeding. It, standing alone, points up the inequity and unlawfulness of the divisions in issue and supplies the answer to what those divisions should be. The finding reads:

> "On interterritorial traffic between official and southern territories, the rates are divided on what is known as the No. 29885 division of rates, which is on a graduating mileage-block basis of 50-mile blocks. On traffic moving between border points

and the South over an official-territory carrier, the 29885 division applies, whereas on similar traffic moving between border points and the North over a southern line, the divisions are on a mileage prorate basis. As a result, the southern carriers receive smaller divisions for comparable distances than the northern carriers. For example, the defendants divide the revenue on the 29885 basis on traffic originating at Louisville and moved by the Baltimore and Ohio Railroad Company to Cincinnati, thence to a point in the South. This is the basis sought by the complainants on traffic originating at Louisville and moved by the L.&N. to Cincinnati, thence to a point in official territory."

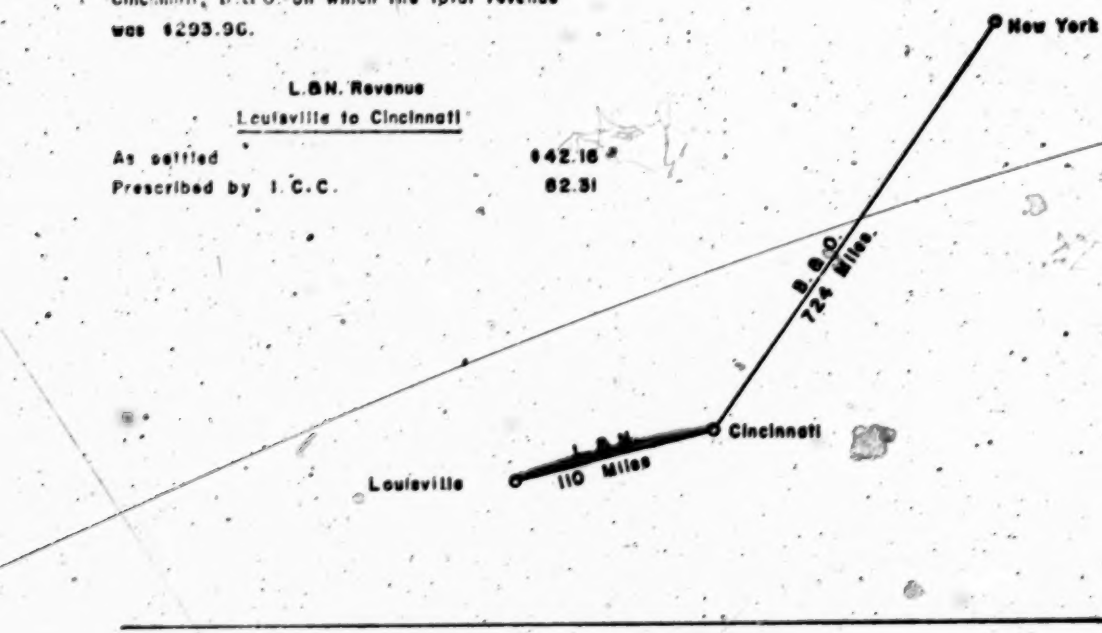
This is illustrated on the next following page, which shows that where the L. & N. performed a haul of 110 miles from Louisville to Cincinnati on a shipment to New York it received, under the basis of divisions of which it complained, $42.16 per car, whereas the B. & O. for a like haul from Cincinnati to Louisville on a shipment to New Orleans would receive $82.31, the latter being the exact amount the Commission has fixed for the L. & N. in this proceeding.

FIGURE A:

A typical movement involved in this case, I.C.C. Docket No. 32055, was a carload shipment of tractors weighing 40,269 pounds from Louisville, Ky., to New York, N.Y., via L.&N., Cincinnati, B.&O. on which the total revenue was $293.90.

L.&N. Revenue
Louisville to Cincinnati

As settled	$42.16
Prescribed by I.C.C.	82.31



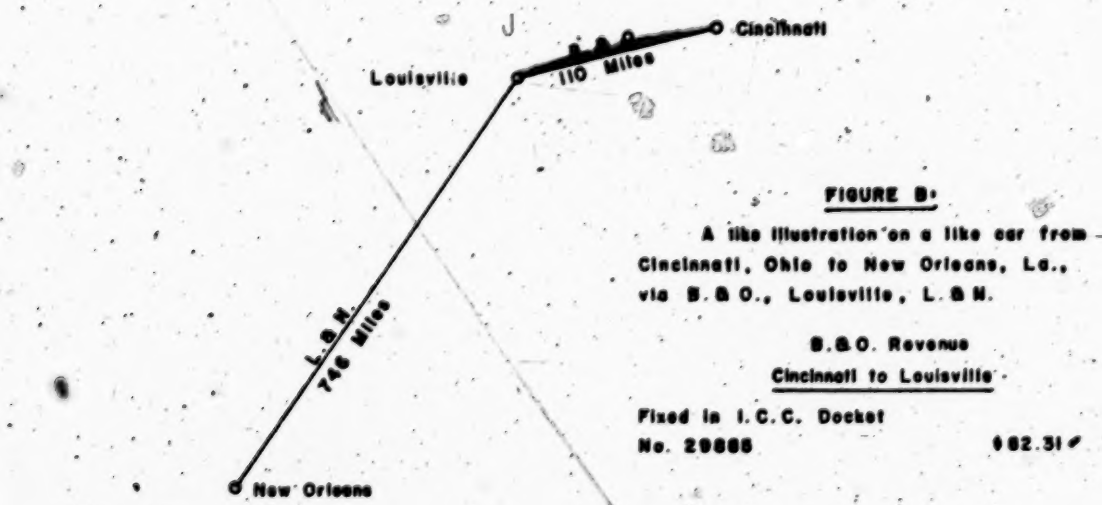


FIGURE B:

A like illustration on a like car from Cincinnati, Ohio to New Orleans, La., via B.&O., Louisville, L.&N.

B.&O. Revenue
Cincinnati to Louisville

Fixed in I.C.C. Docket No. 29888	$82.31

As to the element of relative costs, on which the appellants lay such great stress, the Court below said:

> "An examination of the massive record of the proceedings before the Commission discloses that an abundance of evidence relating to costs was introduced at the hearings before the examiner. A study of the Commission's report shows clearly that the Commission gave careful consideration to this evidence." (p. 21a)

The Court below expressly found:

> "The Commission's finding that border-point traffic to the North moves under similar circumstances as border-point traffic to the South is supported by substantial evidence. Joint rates on the latter traffic are being divided on the validly established 29885 basis of divisions." (p. 24a)

The Court also upheld the Commisison on appellants' point of non-joinder of other southern carriers in the proceeding, saying:

> ". . . The failure of such other carriers for undisclosed reasons to join in these proceedings did not preclude L&N and Coast Line from asserting their claim for relief. The joinder of the other southern carriers was not essential. The order entered by the Commission is directed to L&N, Coast Line, and the northern carriers. It does not purport to affect the division of rates between any other southern carrier and the northern railroads. *United States* v. *Abilene & So. Ry. Co.*, 1924, 265 U. S. 274, 283." (p. 28a)

We now proceed to show that none of the questions presented on appeal is substantial.

Appellants' Summary of the Essential Nature of the Questions Presented Clearly Shows Their Unsubstantiality.

At page 20 of the Jurisdictional Statement appellants bring together and epitomize the questions they raise, as follows:

> "Taken together, the questions presented by this appeal raise the eminently substantial issue whether, consistently with its statutory duty and administrative function, the Commission, in prescribing divisions of joint rates, may lawfully base its action solely upon its former conclusions on another and earlier record in another case involving other joint rates, in complete disregard of the substantially different current conditions disclosed by the later record before it."

The clearly unsubstantial character of the questions presented may at once be seen when it is pointed out that they are pitched on the wholly erroneous premise that the Commission based its decision "solely upon its former conclusions on another and earlier record in another case." *The Commission did no such thing.*

The Commission based its decision on the very full record in *this* case, as anyone may plainly and abundantly see upon a reading of the Commission's report.[1]

But the plain and simple equities of the case demanded that the Commission prescribe the same basis

[1] Appendix C to the Jurisdictional Statement.

of divisions here that it had prescribed in another and earlier case,[1] namely that covered by I.C.C. Docket No. 29885, where the appellants occupied the reverse of the position they here occupy and appellees were in the same situation as that here occupied by the appellants. This may readily be appreciated by observing the foregoing chart, on page 5.

As appears in the Commission's decision herein,[2] and indeed as has been shown hereinbefore, the No. 29885 basis of divisions is in effect, under order of the Commission, on freight jointly hauled by southern and northern railroads between the North and the South—that basis fixing the primary divisions between the two groups of railroads—and on freight which these two sets of railroads jointly move between border points,[3] on the one hand, and points in the South, on the other. It was not contemporaneously put in effect on freight moved by the same two sets of railroads between such border points, on the one hand, and points in the North, on the other, only by reason of the wholly fortuitous circumstance that divisions of joint rates on the last-named movements were not technically before the Commission,[4] although southern railroads believed they were, the Commission having ruled

[1] *Official-Southern Divisions*, 287 I.C.C. 497 (1953).

[2] Appendix C to the Jurisdictional Statement, pp. 32a, 56a and 57a. Please see also the District Court's opinion, Appendix A to the Jurisdictional Statement, pp. 13a-14a.

[3] "Border points," as used herein, means the points on the border between the North and the South. Please see Footnote 6 to the opinion of the District Court, Appendix A, p. 4a.

[4] As is explained in the opinion of the District Court at pp. 3a-5a of Appendix A of the Jurisdictional Statement.

against the position of the southern railroads on this technical point.

It was, in the view of southern railroads, a violation of Section 1(4) of the Interstate Commerce Act—that provision requiring all railroads to establish just, reasonable and equitable divisions of joint rates—for the northern railroads not to make that basis effective between such border points on the one hand, and points in the North, on the other, where northern and southern railroads participated in the movement, regardless of that ruling; and when the northern railroads refused to do so, the southern railroads here involved concluded that they had no alternative except to file the complaint[1] which gave rise to this proceeding.

So long as the divisions basis generally in effect between the South and the North, and between border points and the South, when northern and southern railroads jointly participate in the movement, is the No. 29885 basis, it naturally and logically follows that the same basis should apply between border points and the North, where northern and southern lines jointly participate in the movement. Simple fairness demands such a conclusion.

Certainly the Commission could use as a measuring rod the divisions it had heretofore prescribed for application under similar circumstances, and that were in effect on similar movements. It did no more here than that.[2] Comparison with other such divisions

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[1]Jurisdictional Statement, pp. 5a-6a.

[2]Please see to this effect its first statement in the second full paragraph on p. 56a of Appendix C of the Jurisdictional Statement.

is a well-recognized standard with the Commission. *Agwilines, Inc.* v. *Akron, C. & Y. Ry. Co.*, 248 I.C.C. 255, 260-261 (1941); *Official-Southern Divisions*, 287 I.C.C. 497, 526-527 (1953).

Furthermore, appellants themselves placed in evidence in this case material from the record in No. 29885, the Court below stating:

> "All the parties before the Commission in this case were also parties before the Commission in Docket No. 29885. At the hearing before the examiner the plaintiffs themselves introduced in evidence (Exhibit 35) a documentary history of the divisions of border-point rates prescribed in Docket Nos. 24160 *and* 29885." (p. 23a)

The appellants, however, have ignored altogether all that this Court has said of the meaning of Sections 1(4) and 15(6), it being to the effect that their purpose, using the words of this Court, "is to empower and require the Commission to make divisions that colloquially may be said to be fair" (*Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 357 [1936]). They have insisted throughout this case—and this is their insistence here—that what those sections of the Act really mean is that the Commission should decide such a case as this one based on what they have chosen to call "matters going to relative costs of service,"[1] and that, in determining the meaning of this phrase, and giving it proper application, the Commission was

[1]This language is used in the statement of Question 2, at page 4, in the statement of Question 3, at page 5, and at page 13 of the Jurisdictional Statement. It is the creation of the appellants, not being found in either Section 1(4) or Section 15(6) of the Act.

obliged to accord controlling weight to the *particular* cost figures developed by them in this case.

The appellants indicate that the Commission in other cases has given controlling weight[1] to the element of relative cost of service. In so doing they conveniently pass by what this Court has said on the subject. The following is the clear and unmistakable language of this Court, from *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 359 (1936):

> "There is no single test by which 'just,' 'reasonable' or 'equitable' divisions may be ascertained; no fact or group of facts may be used generally as a measure by which to determine what division will conform to these standards. Considerations that reasonably guide to decision in one case may rightly be deemed to have little or no bearing in other cases. Error as to the weight to be given financial needs, operating costs or other material facts is not a misconstruction of the Act."

More pointedly this Court said in *United States* v. *Abilene & Sou. Ry. Co.*, 265 U. S. 274, 284 (1924):

> "Relative cost of service is not the only factor to be considered in determining just divisions."

Please see also *The New England Divisions Case*, 261 U. S. 184, 195 (1923) and *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, 116 (1928).

As the Court below correctly said:

> "The statute,[2] however, does not establish cost of service or any other factor as the primary crite-

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[1] Jurisdictional Statement, p. 13.

[2] Here the Court quoted, in a footnote, the language of Section 15(6) of the Act.

rion of fair divisions. 'Due consideration' is not the equivalent of 'primary consideration.' The importance to be given any of the factors enumerated in the statute must necessarily depend upon the case under consideration. The evaluation of the importance of the various factors in any given case is peculiarly the function of the Commission." (pp. 20a, 21a)

The Commission here gave much consideration to the evidence pertaining to relative costs, the District Court having said, as we have earlier herein pointed out, that "the Commission's report shows clearly that the Commission gave careful consideration to this evidence" (p. 21a).

But the Court did not accord to appellants' cost evidence the weight appellants think should have been accorded to it. This is the essential nature of the issues appellants bring forward in their Jurisdictional Statement. They present no novel question for this Court. Basically theirs is the age-old protest of an unsuccessful litigant in a case of this kind that the expert tribunal—"appointed by law and informed by experience"[1]—has not accorded its evidence the same measure of weight that the litigant accords it and that the litigant thinks the Commission should have accorded it. But as this Court has said, in *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 359 (1936), ". . . The commission alone is authorized to decide upon weight of evidence. . . ."

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[1] *Illinois Central R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454 (1907).

These considerations should suffice, we respectfully submit, to warrant the granting of our motion. But we reinforce them, dealing with the separate questions listed by appellants, as follows:

Questions 1, 2 and 3 Are Unsubstantial.

Appellants group as one their Questions 1, 2 and 3, asserting that they raise the issue whether the Commission may lawfully prescribe divisions "in entire disregard of the uncontroverted evidence respecting the cost relationships" (p. 13) of the involved railroads. The attack is largely upon the Commission's ruling that cost showings which represented merely "territorial or systemwide averages . . . are not determinative of the costs of these particular movements" (p. 55a), *i. e.*, the particular movements to which the joint rates involved in this case apply. The Commission has often made similar rulings. Please see, for example, *Divisions of Rates, Official and Southern Territories*, 234 I.C.C. 175, 218 (1939). And this Court has recognized the soundness of such conclusions. *Baltimore & Ohio R. Co.* v. *United States*, 298 U. S. 349, 380 (1936); *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 88 (1930).

As the Court below found, the L. & N. "did introduce in evidence its own actual costs in place of average costs" (p. 22a), the Court then stating:

> ". . . The costs put in evidence by N.Y.C. were unadjusted average costs for the northern railroads which did not reflect the actual costs.

> The Commission found that this evidence was not helpful in determining the costs of the particular traffic involved in this case. N.Y.C. now takes the position that the burden of adjusting the average costs presented in evidence by the *plaintiffs* was on the L & N, even though the data necessary to make these adjustments were not available to the L & N and could only be produced by the plaintiffs themselves. We think this position is untenable."

Appellants refer (pp. 17-18) to one treatment, in their studies of particular traffic involved, *i. e.*, of the movement of automobile parts from Detroit, Mich., to Louisville, Ky., via the D. T. & I.-P. R. R.-L & N., but the elements of cost shown therein were dealt with in an altogether different manner for the northern and southern carriers involved, resulting in a complete lack of comparability. Appellants say the Commission gave such evidence no consideration (p. 15), but such is not the case, since all of the "cost evidence in support of the reasonableness of the present divisions" submitted by appellants was referred to by the Commission and it held (p. 55a) that "the only comparable cost data . . . are on the basis of territorial or systemwide averages," the Commission going on to rule that such comparisons are "not determinative" of the relative costs of the involved carriers in the handling of the particular movements involved (p. 55a).

Questions 4 and 5 Are Unsubstantial.

Appellants lump together their Questions 4 and 5 and assert that they raise questions of the power of the Commission under Section 15(6) of the Interstate Commerce Act.

In their Question 4, appellants express doubt as to the power of the Commission to prescribe the divisions it has prescribed "upon the complaint of only two railroads of one group" (p. 5). As we have shown in our Opening Statement, the lower court effectively disposed of this objection, pointing out, among other things, that the order of the Commission "does not purport to affect the division of rates between any other southern carrier and the northern railroads" (p. 28a).

Question 4 also raises the issue whether there was a proper basis in the record for the prescription by the Commission of a group basis of divisions for the northern lines (p. 17). The Commission had before it a most comprehensive record—everything indeed which the involved carriers regarded as pertinent for the Commisison's consideration, including individual showings as to the traffic involved and other factors (pp. 34a-50a). As the Court below found:

> ". . . The evidence received at the hearings is contained in 823 pages of transcript and 131 exhibits, many of them of great length, consisting of massive tabulations of statistics relating to movements of traffic, costs, revenues, and divisions of joint rates both on the present and 29885 bases. . . ." (p. 6a)

Of the 131 exhibits two, Exhibits Nos. 2 (I.C.C. Tr. 13, 64) and 33 (I.C.C. Tr. 186, 191), comprised 114 large pages which, with additional thousands of pages of worksheets, made available to the parties, showed all pertinent information as to each individual car which moved between the involved points during a two-month period.[1]

Following a lengthy summarization of the Commission's report (pp. 13a-18a), the Court below found that the evidence before the Commission was "typical in character and sufficient in quantity . . . to enable the Commission to prescribe the 29883 basis of divisions," treating the northern railroads as a group (p. 26a).

Finally appellants, in Question 5, assert that the Commission inferred here (p. 17), contrary to the decision of this Court in *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, 117 (1928), that every existing division involved here was unjust because in the aggregate the divisions involved appeared to be unjust.

There is no basis whatever for such a charge. Here the Commission did not, as in that case, rely on averages, the Court there pointing out, at the cited page, that "averages are apt to be misleading."

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[1]The study covered 88 percent of the traffic (I.C.C. Tr. 25), the omitted 12 percent being cars moving under transit the destination of which was not then determinable (I.C.C. Tr. 26-27), and some cars moving via East St. Louis, Ill., which were later included in the record as Exhibit No. 40 (I.C.C. Tr. 359, 400). "Cars moving under transit" means cars of freight which move from an origin to an intermediate point, at which they are stopped in transit for some purpose (*e. g.*, for the processing of wheat into flour), after which the cars move to final destination.

Here, indeed, appellants are seeking to have this Court invalidate an order of the Commission chiefly because it did not accept, as controlling in the case, *appellants' averages,* which were found by the Commission not to be "determinative" on the issue of relative costs (p. 55a).

In the *Brimstone* case the Commission's order was struck down because, *inter alia,* it accepted averages "as a substitute for typical evidence as to the individual joint rates and divisions." Here there was no such substitution.

Here, as we have just shown, there was detailed evidence with respect to the joint rates and divisions applicable to the particular traffic involved, and the lower court found that the evidence presented was typical in character and sufficient in quantity to justify the prescription of the group basis determined by the Commission—which it had earlier prescribed, at the instance of the appellants, in favor of the appellants, in a situation just the reverse of that here presented.

As was said in *I.C.C.* v. *Jersey City,* 322 U. S. 503, 512-513 (1944), quoting from *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591, 602 (1944), ". . . he who would upset the . . . order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." Certainly such a showing has not been made here. Certainly the showing is, on the contrary, that the order is just, reasonable and equitable in its consequences.

CONCLUSION.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the Court below should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE.

I, R. Wray Henriott, one of the attorneys for Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company, appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 22nd day of August, 1962, I served copies of the foregoing Motion to Affirm and Brief to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing a copy each, in a duly addressed envelope, with air mail postage prepaid, to Archibald Cox, Esq., The Solicitor General, Department of Justice, Washington 25, D. C., W. Arthur Garrity, Esq., United States Attorney, Federal Building, Boston, Mass., and Paul J. Redmond, Assistant United States Attorney, Federal Building, Boston, Mass.

2. On the Interstate Commerce Commission, by mailing a copy each, in a duly addressed envelope, with air mail postage prepaid, to Robert W. Ginnane, Esq., General Counsel, and Charlie H. Johns, Esq., Counsel, both at the offices of the Commision, Washington 25, D. C.

3. On Appellants, Boston and Maine Railroad, et al., by mailing a copy each, in duly addressed envelopes, with air mail postage prepaid, to Joseph F. Eshelman, Esq., 1600 Three Penn Center Plaza, Philadelphia 2, Pa., James Garfield, Esq., 30 State Street, Boston 9, Mass., Conrad W. Oberdorfer, Esq., 30 State Street, Boston 9, Mass., and Kenneth H. Lundmark, Esq., 466 Lexington Avenue, New York 17, N. Y.

(Signed) R. WRAY HENRIOTT,
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Attorney for Appellees Louisville and Nashville Railroad Company and Atlantic Coast Line Railroad Company.